Supreme Court, U.S.
FILED
93 1486 MAR 21 1994
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF TEXAS INVESTMENT BANK, N.A., PETITIONER

v.

ROCKLEIGH S. DAWSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DREW S. DAYS, III
Solicitor General

PAUL BENDER
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

JACK D. SMITH
Acting General Counsel

ANN S. DUROSS
Assistant General Counsel

RICHARD J. OSTERMAN, JR.
JOAN E. SMILEY
Attorneys
Federal Deposit Insurance Corporation
Washington, D.C. 20429

BEST AVAILABLE COPY

47pp

QUESTION PRESENTED

Whether federal law establishes the standard for determining when the adverse domination doctrine tolls the statute of limitations on claims brought against allegedly wrongdoing officials of a failed federally insured financial institution by the FDIC as receiver for the institution.

PARTIES TO THE PROCEEDING

In addition to the respondent named in the caption, Kirk K. Weaver and Michael D. Maloy also are respondents.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Reasons for granting the petition	6
Conclusion	12
Appendix A	1a
Appendix B	22a
Appendix C	28a
Appendix D	30a

TABLE OF AUTHORITIES

Cases:

Farmers & Merchants National Bank v. *Bryan*, 902 F.2d 1520 (10th Cir. 1990)	4, 9, 10
FDIC v. *Appling*, 992 F.2d 1109 (10th Cir. 1993)	10
FDIC v. *Cocke*, 7 F.3d 396 (4th Cir. 1993)	11
O'Melveny & Myers v. *FDIC*, cert. granted, 114 S. Ct. 543 (1993)	12
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979)	7

Statute:

12 U.S.C. 1821(d)(14) (Supp. IV 1992)	3

In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF TEXAS INVESTMENT BANK, N.A., PETITIONER

v.

ROCKLEIGH S. DAWSON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Deposit Insurance Corporation, as Receiver of Texas Investment Bank, N.A., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 4 F.3d 1303. The orders of the district court (App., *infra*, 22a-27a, 28a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1993. A petition for rehearing was denied

on December 21, 1993. App., *infra*, 30a-31a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the activities of the three respondents—Dawson, Weaver, and Maloy—in the management of Texas Investment Bank, N.A. Each of the respondents served as an officer or director of that institution for all or a portion of the period from 1982 until 1987. The Federal Deposit Insurance Corporation (FDIC) was appointed receiver for the institution in May, 1987. See App., *infra*, 2a-3a, 8a.

2. On April 2, 1990, the FDIC filed this suit in its capacity as receiver. The complaint alleges that respondents acted negligently, breached their fiduciary duties to the institution, and violated their oaths as directors in the course of their conduct at the institution. Specifically, the complaint alleges that from 1982 to 1984 the institution made 82 unsafe and unsound loans, which constituted unsafe and unsound banking practices that the board of directors of the bank should have prevented. See App., *infra*, 3a-4a.[1]

a. Respondents Weaver and Dawson moved for dismissal of the complaint, arguing that the complaint was barred by the applicable statute of limitations. On December 10, 1991, the district court granted

---

[1] The complaint also named Wayne C. Desselle as a defendant. When Desselle did not respond to the complaint, the district court entered a default judgment in favor of the FDIC against him. See App., *infra*, 2a, 4a. Because Desselle did not appeal that judgment, Desselle is not a party to the proceedings in this Court.

their motions. App., *infra*, 22a-27a. The court concluded that the causes of action set forth in the complaint initially accrued no later than October 5, 1984, the date the last challenged loan was made. *Id.* at 25a-26a. The court held that those claims were governed by the two-year statute of limitations applicable to tort claims under Texas law. *Id.* at 24a-25a. Under that reasoning, absent tolling, the statute of limitations would have expired on October 5, 1986, before the FDIC became receiver of the institution. *Id.* at 26a.[2]

The court then rejected the FDIC's contention that the statute of limitations had been tolled before the receivership through operation of the adverse domination doctrine. The court stated that the adverse domination doctrine applies only "when the allegedly culpable directors constitute a majority of the board of directors" and held that the doctrine could not apply in this case because the FDIC had not brought suit against a majority of the board of directors. App., *infra*, 26a. Accordingly, the court concluded that the FDIC's complaint should be dismissed as to respondents Dawson and Weaver. *Id.* at 26a-27a.

---

[2] Although the district court did not explain its reasoning, the court apparently followed the Fifth Circuit's rule that, notwithstanding the apparently plain language of 12 U.S.C. 1821(d)(14) (Supp. IV 1992) (which provides that the statute of limitations on a claim brought by the FDIC as receiver does not begin to run before the FDIC is appointed receiver), the FDIC is not entitled to pursue claims for which the applicable limitations period already had expired before the FDIC was appointed receiver. See App., *infra*, 5a-7a (discussion of that rule by the court of appeals).

b. Respondent Maloy subsequently filed a motion to dismiss, seeking dismissal on the same grounds as Weaver and Dawson. The district court granted that motion on May 4, 1992. App., *infra*, 28a-29a. The court explained that the FDIC "has asserted the same claims against Maloy that were asserted against Dawson and Weaver" and reasoned that its dismissal of the claims against Dawson and Weaver mandated dismissal of the claims against Maloy. *Id.* at 29a.

3. The court of appeals affirmed. App., *infra*, 1a-21a. The principal issue addressed in its opinion was whether the adverse domination doctrine tolled the statute of limitations. *Id.* at 8a-21a.

a. In resolving that issue, the court focused on an "important preliminary issue," namely, "whether state or federal law governs the FDIC's assertion of the adverse domination doctrine." App., *infra*, 10a. The court acknowledged that "[t]he Tenth Circuit has squarely held in a similar case that the question of whether the state's statute of limitations was equitably tolled was a question of federal law." *Ibid.* (citing *Farmers & Merchants National Bank* v. *Bryan*, 902 F.2d 1520, 1522 (10th Cir. 1990)). The Fifth Circuit, however, specifically declined "to follow the approach of the *Bryan* court" and held, instead, "that the Texas law of adverse domination applies." Pet. App. 12a.

b. The court then turned to the question of whether the Texas version of the adverse domination doctrine would toll the statute of limitations in this case. App., *infra*, 12a-21a. The court held that Texas follows the "majority" rule, under which tolling occurs if the plaintiff shows "that a majority of the

board members were wrongdoers," rather than the stricter "complete domination" rule, under which the plaintiff must show "full, complete and exclusive control in the directors or officers charged." *Id.* at 13a-15a. The court also concluded that, as applied in *Texas*, the "majority" rule does not require a suit against a majority of the directors, as long as the plaintiff alleges misconduct by a majority. *Id.* at 15a-17a.

Finally, the court considered the level of culpability that the plaintiff must show under Texas law on the part of the malfeasant directors for tolling to occur. App., *infra*, 17a-21a. The court acknowledged that most federal courts applying the adverse domination doctrine in cases involving the FDIC and the Resolution Trust Corporation (RTC) generally have concluded that "negligence alone" is sufficient for tolling to occur, and stated that "[u]nder [that] approach, adverse domination tolling could be available to the FDIC in the instant case." *Id.* at 19a. The court rejected that approach, however, relying on its understanding of the general inclinations of the Texas Supreme Court in interpreting statutes of limitation (*id.* at 18a-19a),[3] as well as similar decisions of state courts in California (*id.* at 20a). On that basis, the court concluded that the adverse domination doctrine "must be limited to those cases in which the culpable directors have been active participants in wrongdoing or fraud, rather than simply negligent." *Ibid.* Because the court concluded that the FDIC's submissions in the district court "showed only negli-

---

[3] The court saw its role as being "to predict how a Texas court would decide this issue." App., *infra*, 18a.

gence on the part of the majority of [the institution]'s board of directors," it affirmed the district court's entry of judgment in favor of respondents. *Id.* at 21a.[4]

4. The court of appeals denied the FDIC's petition for rehearing and suggestion of rehearing en banc without dissent. App., *infra*, 30a-31a.

REASONS FOR GRANTING THE PETITION

As the Fifth Circuit's opinion explicitly acknowledges, its decision that state law governs the tolling of the statute of limitations in this case squarely conflicts with the Tenth Circuit's resolution of the same question. The issue has very substantial financial importance for the federal government. Accordingly, the decision warrants review by this Court. As we explain below, however, it is possible that this Court's disposition of *O'Melveny & Myers* v. *FDIC*, cert. granted, No. 93-489 (Nov. 29, 1993) (set for argument March 21, 1994), will shed light on the proper analysis to be used in deciding this case. Accordingly, we suggest that it would be appropriate to hold this petition pending this Court's disposition of *O'Melveny*.

1. The decision of the court of appeals rests on the premise that there is "no justification for applying federal equitable tolling principles" in this case, because the limitations period initially applicable to the causes of action presented in this case was prescribed by a state statute. App., *infra*, 12a. That premise ignores the strong federal interest in adequately

---

[4] The court of appeals treated the district court's rulings on the motions to dismiss as grants of summary judgment, because the district court relied on matters outside the pleadings in disposing of those motions. App., *infra*, 4a-5a.

preserving claims against malfeasant officers and directors of financially insured depository institutions.

In *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), this Court explained that, in many circumstances, "federal law governs questions involving the rights of the United States arising under nationwide federal programs." *Id.* at 726. The *Kimbell Foods* opinion articulated three considerations that determine "[w]hether to adopt state law or to fashion a nationwide federal rule." *Id.* at 728. First, "federal programs that by their nature are and must be uniform in character throughout the Nation necessitate formulation of controlling federal rules." *Ibid.* (internal quotation marks omitted). Second, "[a]part from considerations of uniformity," a court should "fashion special [federal] rules" where "application of state law would frustrate specific objectives of the federal programs." *Ibid.* Finally, the decision whether to fashion a federal rule also should take into account "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law." *Id.* at 729.

As we explain in our brief on the merits in *O'Melveny*, at 28-34,[5] the rule of *Kimbell Foods* frequently calls for the articulation of a uniform federal rule where the FDIC as receiver pursues claims on behalf of the creditors of federally insured financial institutions. That federal rule must take into account the unique role of the FDIC as receiver, including the FDIC's inability to bring such suits before the

[5] We have provided counsel for respondents a copy of our brief on the merits in *O'Melveny*.

institution fails, as well as the FDIC's role as insurer of depositor's accounts, which makes it the largest creditor of failed financial institutions. Application of a uniform federal rule in such cases does not unfairly undermine reasonable expectations, because wrongdoing officers and directors of financially insured institutions cannot reasonably assume that the wrongful or negligent failure of their corporate boards promptly to bring suit for their wrongful activity should immunize them from liability for that activity.

The issue here is closely related to the issue before the Court in *O'Melveny*. As the court of appeals acknowledged, state courts have had relatively few opportunities to consider the adverse domination doctrine in recent years. See App., *infra*, 19a. It makes little sense for federal courts to attempt to guess, on a state-by-state basis, how state courts would resolve such questions if they were to be presented to them. See Gov't *O'Melveny* Br. at 29. On the other hand, there is a strong federal interest in the development of a uniform federal adverse domination doctrine that takes into account the special responsibilities of the officers and directors of federally insured institutions, the role of the FDIC as receiver and guardian of the federal insurance fund, as well as the legitimate interests of individuals and the judicial system in protection from truly stale causes of action. Also, here, as in *O'Melveny*, there is no basis for serious concern that application of a uniform federal rule will upset reasonable commercial expectations; respondents can express no surprise at the notion that federal law would govern the time within which the FDIC can bring suit to recover

damages inflicted on the federally insured and pervasively regulated institution by which they were employed. See Gov't *O'Melveny* Br. at 33-34.

2. The adverse domination rule applied by the court of appeals differs significantly from the appropriate federal standard. The court of appeals acknowledged that federal courts applying the adverse domination doctrine in cases involving the FDIC and the RTC generally have concluded that negligence on the part of a majority of the directors is sufficient to justify invocation of the doctrine when insiders have acted fraudulently. App., *infra*, 19a. The only federal court of appeals that has considered what the federal rule should be has reached the same result. See *Bryan*, 902 F.2d at 1523 (FDIC made out its case by showing that the directors "knew or should have known the facts giving rise to possible liability").

The contrary conclusion of the court of appeals, reached through application of Texas law—that the adverse domination doctrine "must be limited to those cases in which the culpable directors have been active participants in wrongdoing or fraud, rather than simply negligent," App., *infra*, 20a—rested on the Fifth Circuit's understanding of the general inclinations of the Texas courts. See, *e.g.*, *id.* at 18a-19a (discussing Texas Supreme Court cases regarding the general policies of statutes of limitations). That conclusion does not give sufficient weight to the practicalities that have led most courts considering the question to conclude that negligence on the part of a majority of the directors is sufficient. The adverse domination doctrine exists because of the serious vulnerability of corporations harmed by wrongdoing corporate insiders. In such circum-

stances, it is inequitable to allow the malfeasant insiders to rely on the statute of limitations unless the corporation had a fair opportunity to bring suit against the wrongdoers during the applicable limitations period. But a fair opportunity to bring suit is lacking where a majority of the directors were negligent, as well as where they were active participants in the wrongdoing. When a majority of the directors improperly do not act to remedy the wrongdoing of other directors or insiders, it makes no difference to the institution whether the reason is that the directors willfully covered up or collaborated in the wrongdoing, or simply that they acted negligently in failing to discover or act upon it. In either case, the wrongdoing of the insiders—absent application of the adverse domination doctrine—would deprive the institution of a remedy and allow the wrongdoers to escape liability for the harm they caused. The federal adverse domination doctrine employed by the Tenth Circuit prevents that unfair result.

3. The court of appeals acknowledged that its decision conflicted with a decision of the Tenth Circuit that—to use the Fifth Circuit's words—"squarely held in a similar case that the question of whether the state's statute of limitations was equitably tolled was a question of federal law." App., *infra*, 10a (citing *Farmers & Merchants National Bank* v. *Bryan*, 902 F.2d 1520, 1522 (10th Cir. 1990)). *Bryan* remains good law in the Tenth Circuit. See *FDIC* v. *Appling*, 992 F.2d 1109, 1115-1116 (10th Cir. 1993) (following *Bryan*). Because the court of appeals denied the FDIC's suggestion of rehearing en banc in this case (App., *infra*, 30a-31a) there is, in addition, no

reason to believe that the courts of appeals will resolve the existing conflict without intervention by this Court.

The question presented by this case is, furthermore, of great financial importance to the United States. The FDIC has advised us that the decision in this case, together with the similar decision of the Fourth Circuit in *FDIC* v. *Cocke*, 7 F.3d 396 (1993),[6] calls into question more than $500 million of claims the FDIC currently has pending nationwide, involving at least 49 failed institutions. Similarly, the RTC has advised us that it has at least 22 pending actions, involving claims of more than $1.3 billion in the Fourth and Fifth Circuits alone, which would be called into question by the decisions in this case and *Cocke*.

4. In our view, it would be appropriate for the Court to hold the petition in this case pending its disposition of *O'Melveny*. For the reasons outlined above, the Court's decision in *O'Melveny* may shed light on the proper resolution of the issues in this case. It thus might be appropriate after the *O'Melveny* decision to grant the petition in this case, vacate the decision of the court of appeals, and remand the case for further consideration in light of *O'Melveny*. Alternatively, if the disposition of *O'Melveny* does not make that course appropriate and does not resolve the circuit conflict, we believe that

---

[6] Today we are filing a petition for a writ of certiorari seeking review of the decision of the Fourth Circuit in *Cocke*. As we explain in that petition, we believe that the decision in this case presents a more suitable vehicle for plenary review of the question presented by these cases. We have provided a copy of the *Cocke* petition to counsel for respondents.

the Court should grant the petition in this case and set the case for oral argument.

CONCLUSION

The petition for a writ of certiorari should be held, pending disposition of *O'Melveny & Myers* v. *FDIC*, cert. granted, 114 S. Ct. 543 (1993) (No. 93-489) (set for argument March 21, 1994), and disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

PAUL BENDER
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

JACK D. SMITH
Acting General Counsel

ANN S. DUROSS
Assistant General Counsel

RICHARD J. OSTERMAN, JR.
JOAN E. SMILEY
Attorneys
Federal Deposit Insurance Corporation

MARCH 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2460

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver of TEXAS INVESTMENT BANK,
PLAINTIFF-APPELLANT,

VS.

ROCKLEIGH S. DAWSON, JR., ET AL.
DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS

Oct. 21, 1993

Before: REAVLEY, KING, and GARWOOD, Circuit Judges.

KING, Circuit Judge:

The Federal Deposit Insurance Corporation as receiver sued certain directors and officers of a failed bank, alleging that the bank had incurred substantial losses due to their actions and omissions. The district court granted summary judgment in favor of the defendants Rockleigh S. Dawson, Jr., Kirk K.

Weaver, and Michael D. Maloy, and the FDIC appeals. We affirm.

I.

The defendants in this action were all directors or employees of Texas Investment Bank, N.A. ("TIB"), a federally insured banking institution organized, existing, and operating under the laws of the United States. On May 21, 1987, the United States Office of the Comptroller of the Currency ("OCC") declared TIB to be insolvent. The OCC ordered TIB closed and appointed the FDIC as receiver. As part of its effort to recover on losses to the federal deposit insurance fund caused by the failure of TIB, the FDIC sued to recover damages allegedly resulting from the negligent discharge of duties by defendants Rockleigh S. Dawson, Jr. ("Dawson"), Kirk R. Weaver ("Weaver"), Michael D. Maloy ("Maloy"), and Wayne C. Desselle ("Desselle") as officers or directors of TIB.

Defendant Dawson became president and chief executive officer of TIB on March 17, 1981, and was elected as a director of TIB on January 19, 1982. He served as a director and as president until his resignation on May 12, 1987. Additionally, he served as chairman of TIB's loan committee from April 28, 1981, until April 28, 1987. Defendant Weaver became a director of TIB on January 19, 1982, and he served as a director until his resignation on April 28, 1987. Defendant Maloy was a loan officer for TIB from January 18, 1983, through April 28, 1987. Additionally, he served as vice-chairman of the loan committee from January 18, 1983, until August 26, 1984. Although there is some dispute, it appears that Maloy was a nonvoting advisory director from April 1984

until he was elected as a full board member in 1986 or 1987.

The structure of TIB's organization with respect to its lending function is somewhat complicated. Until April 21, 1982, there was a "Loan and Discount Committee" made up of TIB directors. This committee was not re-elected by the board on that date, and the board did not again establish a board level loan committee until August 21, 1984, when it created the "Executive and Loan Committee." From December 31, 1980, to August 27, 1984, TIB's lending functions were supervised by a loan committee composed of Dawson, Maloy, and other bank officers.

This suit was brought by the FDIC based on the activities of defendant Desselle, who is not a party to this appeal. Desselle was hired by TIB as a loan officer on or about August 31, 1981, and he was elected a vice-president on September 15, 1981. The FDIC alleges that Desselle, Maloy, and Dawson made a series of 82 unsafe and unsound loans beginning on February 18, 1982, and continuing through October 5, 1984. The FDIC also alleges that these loans constituted unsafe and unsound banking practices that should have been detected and prevented by Dawson and the other members of TIB's board of directors. Desselle resigned effective January 1984. The last allegedly unsound loan was made by Dawson on October 5, 1984.

Having been appointed receiver of TIB, the FDIC brought suit against Dawson, Weaver, Maloy, and Desselle on April 2, 1990. The complaint alleged negligence and breach of fiduciary duty on the part of the defendant directors for a number of acts and omissions related to their failure to supervise Desselle. The complaint also alleged that the defendant directors' acts and omissions constituted a breach of

a contract formed when each director took his oath of office. The FDIC moved for summary judgment against Desselle, and the district court entered summary judgment against Desselle after he failed to respond.

Dawson and Weaver moved for dismissal and summary judgment as to all of the FDIC's claims, alleging that the claims were barred by the statute of limitations. On December 10, 1991, the district court granted Weaver's motions for summary judgment and to dismiss; it denied Dawson's motion for summary judgment as moot and granted his motion to dismiss. Maloy then moved for summary judgment and to dismiss, and his motion was granted on May 4, 1992. This appeal followed.

II.

Because the parties presented matters outside the pleadings to the court and the court did not exclude them in deciding these motions to dismiss and motions for summary judgment, we treat all of the district court's decisions as summary judgment decisions. Fed. R. Civ. P. 12(b), (c); *see also Fraire v. City of Arlington*, 957 F.2d 1268, 1273 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 462, 121 L.Ed.2d 371 (1992). We review the grant of summary judgment de novo, using the same criteria used by the district court in the first instance. *Id.* The evidence and inferences to be drawn therefrom are reviewed in the light most favorable to the non-moving party. *Id.* Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). We note also that,

in reviewing the record, we are not bound to the grounds articulated by the district court for granting summary judgment, for we may affirm the judgment on other grounds. *Harbor Ins. Co. v. Urban Constr. Co.*, 990 F.2d 195, 199 (5th Cir.1993).

III.

The FDIC presents two arguments for reversal. First, it argues that the statute of limitations was tolled during the tenure of the corporate wrongdoers under the doctrine of adverse domination. Second, the FDIC argues that the district court erred by applying the tort statute of limitations to its claim based on the directors' oath of office instead of the longer statute of limitations for breach of contract actions. We address the FDIC's second argument first.

A.

The threshold issue on this appeal is whether the district court applied the correct statute of limitations to the FDIC's claims. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA")[1] provides a federal statute of limitations for claims brought by the FDIC as receiver. 12 U.S.C. § 1821(d)(14).[2] This statute, however, has been

---

[1] Pub. L. No. 101-73, 103 Stat. 183 (1989).

[2] 12 U.S.C. § 1821(d)(14) provides:

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

interpreted not to revive stale state law claims acquired by the FDIC. *Randolph v. Resolution Trust Corp.*, 995 F.2d 611, 619 (5th Cir.1993); *FDIC v. Regier Carr & Monroe*, 996 F.2d 222, 225-26 (10th Cir.1993); *FDIC v. Shrader & York*, 991 F.2d 216, 220 (5th Cir.1993); *FDIC v. McSweeney*, 976 F.2d 532, 534 (9th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2440, 124 L.Ed.2d 658 (1993); *see also Resolution Trust Corp. v. Krantz*, 757 F. Supp. 915, 921 (N.D. Ill. 1991) (reasoning that a literal reading of the statute would allow the FDIC to "revive claims relating to acts done during the Great Depression" by merely taking receivership of a bank). Under these cases, the district court must first determine whether the claims being brought by the FDIC were viable under the applicable state statute of limitations at the time the FDIC was appointed receiver. If the state statute has not yet run, the period provided by 12 U.S.C. § 1821(d)(14)(A) then begins to run. *See, e.g., Shrader & York*, 991 F.2d at 220-27 (holding that a legal

---

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of—

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the [FDIC] as conservator or receiver; or

(ii) the date on which the cause of action accrues.

malpractice claim brought by the FDIC was time-barred because the Texas statute of limitations had expired before the FDIC was appointed receiver); *FDIC v. Howse*, 736 F. Supp. 1437, 1447 (S.D. Tex. 1990) (holding that the period provided in 12 U.S.C. § 1821(d)(14) begins to run when the FDIC is appointed receiver, as long as the state limitations period has not already expired).

The district court applied the correct analysis to the FDIC's claims, first deciding whether the claims had expired under Texas law before the FDIC was appointed as receiver. The Texas statute of limitations for negligence and breach of fiduciary duty is two years. Tex.Civ.Prac. & Rem.Code Ann. § 16.003 (Vernon 1986); *Hoover v. Gregory*, 835 S.W.2d 668, 676 (Tex. App.—Dallas 1992, writ denied). The Texas statute of limitations for contract claims is four years. Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (Vernon 1986). The district court applied the two-year statute of limitations to all of the FDIC's claims, holding that the FDIC's claim for breach of contract actually sounded in tort.

The FDIC argues that the four-year limitations period should apply to its "breach of contract" claim against the appellants for violating their oath of office, in which they promised to diligently execute their duties and neither to violate nor to permit to be violated any law of the United States. According to the FDIC there is a "substantial question" as to whether this claim sounds in tort or contract, and therefore the district court should have applied the longer statute of limitations. *Badaracco v. Commissioner*, 464 U.S. 386, 391, 104 S. Ct. 756, 760, 78 L.Ed.2d 549 (1984) ("Statutes of limitation sought to be applied to bar rights of the Government, must

receive a strict construction in favor of the Government.").

There is no substantial question regarding this issue; the law in this circuit is long-settled that claims based upon an oath of office sound in tort. *McNair v. Burt*, 68 F.2d 814, 816 (5th Cir. 1934) ("This suit must rest, not upon the oath, but upon the statutory and common-law right to recover for negligence and dereliction of duty in the management of the bank's affairs."). It is well-established that one panel of our court will not overturn another absent an intervening precedent by our court sitting en banc or a Supreme Court precedent. *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1121 n.8 (5th Cir. 1992). We have discovered no such cases, nor has the FDIC directed our attention to any. The cases cited by the FDIC from other circuits contrary to our holding in *McNair* do not justify a departure from our own precedent. We therefore adhere to our holding in *McNair* that claims based on the oath of office taken by bank directors sound in tort and are subject to the tort statute of limitations.

The district court correctly applied the two-year statute of limitations to all of the FDIC's claims. The FDIC was appointed receiver no earlier than May 21, 1987. The unsound banking practices on which this suit is based ended in 1984. Unless there exists some reason to toll the statute, the district court was correct to grant summary judgment in favor of the appellees based on limitations.

B.

The FDIC argues that the doctrine of adverse domination tolled the statute of limitations in this case so that the claims it acquired upon being appointed receiver were not time-barred. Generally a

statute of limitations begins to run against an action against directors of a corporation for malfeasance or nonfeasance from the time of the perpetration of the wrongs complained of. 3A Stephen M. Flanagan & Charles R.P. Keating, *Fletcher Cyclopedia of the Law of Private Corporations* § 1306 (1986). The doctrine of adverse domination, however, tolls the statute of limitations for as long as a corporate plaintiff continues under the domination of the wrongdoers. *Id.* § 1306.2. The FDIC argues that the doctrine of adverse domination made this case inappropriate for summary judgment. Before proceeding to the merits of this argument, however, we must resolve several preliminary disputes.

Standard of Review

The parties disagree as to the appropriate standard of review of the district court's decision on this issue. The FDIC argues that we should apply the ordinary de novo standard to the adverse domination issue because the district court ruled on the issue by way of granting summary judgment. The appellees, on the other hand, argue that we should apply an abuse of discretion standard because adverse domination is an equitable doctrine. In the past we have applied the de novo standard of review to similar facts. *Cruz v. Carpenter*, 893 F.2d 84, 87 (5th Cir.1990) (reviewing de novo a summary judgment granted by a district court over the plaintiff's assertion of the adverse domination doctrine). Because the district court held that equitable tolling was unavailable as a matter of law and did not withhold equitable tolling simply as a matter of discretion, we follow *Cruz* and apply the de novo standard of review.

Waiver

Next, appellee Weaver raises the argument that the FDIC may not rely on adverse domination because it did not plead the doctrine in either its original or its amended complaint. We note that the pleading requirements in federal court are governed by Federal Rule of Civil Procedure 8 rather than by state law. *Simpson v. James*, 903 F.2d 372, 375 (5th Cir. 1990). Professors Wright and Miller have observed that raising the limitations defense in a motion to dismiss may easily be premature because facts tolling the running of the statute do not necessarily appear in the complaint. *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1277 (1990) ("[I]n practice, courts that allow the adjudication of affirmative defenses on a motion to dismiss or for judgment on the pleadings are converting these motions into summary judgment motions and normally will give all parties the opportunity provided by Rule 56 to present pertinent evidentiary material to the court.") The court properly allowed the parties to present affidavit evidence with the motions and responses and treated the motions as for summary judgment. Fed.R.Civ.P. 12(b), (c). Weaver's contention is without merit.

State or Federal Law?

An important preliminary issue not specifically addressed by the parties is whether state or federal law governs the FDIC's assertion of the adverse domination doctrine. The Tenth Circuit has squarely held in a similar case that the question of whether the state's statute of limitations was equitably tolled was a question of federal law. *Farmers & Merchants Nat'l Bank v. Bryan*, 902 F.2d 1520, 1522 (10th Cir.1990). Under the *Bryan* court's analysis, when

the FDIC brings a claim against the directors of a failed bank, the trial court should "borrow" the appropriate state statute of limitations and apply it to the FDIC's claims. *Id.* Under a line of precedent traceable to the case of *Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S. Ct. 582, 585, 90 L.Ed. 743 (1946), the *Bryan* court also held that the question of equitable tolling remained one of federal law, despite the borrowing of the state statute of limitations. Thus, the *Bryan* court adopted the adverse domination doctrine as part of the federal common law of the Tenth Circuit and applied it to the FDIC's claims. *Id.* at 1522-23.

We are not convinced that the *Bryan* court is correct in its statement that federal equitable tolling principles apply when federal courts borrow state statutes of limitations. As the Seventh Circuit has recently noted, the continued vitality of *Holmberg* and its progeny is in doubt after the Supreme Court's decisions in *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980), and *Johnson v. Railway Express Agency*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). *See Smith v. City of Chicago Heights*, 951 F.2d 834, 839 (7th Cir. 1992). These Supreme Court cases have held that, when state statutes of limitation are borrowed, state tolling principles are to be the "primary guide" of the federal court. *Johnson*, 421 U.S. at 465, 95 S. Ct. at 1722. The federal court may disregard the state tolling rule only if it is inconsistent with federal policy. *Tomanio*, 446 U.S. at 485-86, 100 S. Ct. at 1795-96. The *Bryan* court thus misread the current law

regarding the proper source of tolling rules for federal courts that borrow a state statute of limitations.[3]

Wholly apart from the flaws in the *Bryan* court's reasoning, we disagree with its holding for the more fundamental reason that the federal court is not "borrowing" a state statute of limitations at all in these cases brought by the FDIC under FIRREA. As was well said in *Howse*, the first step in the analysis of the limitations issue is whether the applicable state statute of limitations had already expired when the FDIC acquired the claim. *Howse*, 736 F. Supp. at 1440. That is, because the FDIC is merely acquiring the claims held by the failed bank, the issue is whether the bank would be time-barred if it tried to sue its directors in state court on the date of the FDIC's appointment as receiver. Only if the bank's claims are still viable under state law on that date does the limitations clock start to run anew under FIRREA's limitations provision. Because this step of the analysis is purely a question of state law, there is no justification for applying federal equitable tolling principles to pre-receivership events. If the FDIC is to toll the state statute of limitations prior to its appointment as receiver under the adverse domination doctrine, it must show the district court that the state law of adverse domination would permit tolling. Thus, we decline to follow the approach of the *Bryan* court, and we hold that the Texas law of adverse domination applies.

Texas Law of Adverse Domination

Having determined that Texas law governs the application of the adverse domination doctrine in this

---

[3] *But see Smith*, 951 F.2d at 840 (stating that *Johnson* and *Tomanio* do not necessarily prevent a federal court from applying both state and federal tolling principles).

case, we must next determine the contours of that doctrine in Texas. As will be seen, Texas case law on the topic is sparse, and our interpretation of Texas law will be informed by modern trends in adverse domination law from other jurisdictions. We focus on three questions of paramount importance in this case: (1) How completely must the wrongdoers dominate their corporation in order to trigger adverse domination tolling? (2) Must a plaintiff relying on the adverse domination doctrine sue all allegedly culpable directors? (3) How culpable must a director's conduct be before he will be considered a "wrongdoer" within the meaning of the adverse domination doctrine?

(1)

Two competing theories have emerged with respect to the showing a plaintiff must make in order to establish "domination" of a corporation by wrongdoers. The more difficult test is the "complete domination" test, under which a plaintiff who seeks to toll the statute under adverse domination must show "full, complete and exclusive control in the directors or officers charged." *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir.) (quoting *International Rys. of Cent. Am. v. United Fruit Co.*, 373 F.2d 408, 414 (2d Cir.), *cert. denied*, 387 U.S. 921, 87 S. Ct. 2031, 18 L.Ed.2d 975 (1967)), *cert. denied*, 469 U.S. 932, 105 S. Ct. 329, 83 L.Ed.2d 265 (1984). Once the facts giving rise to possible liability are known, the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue. *Id.*

Other courts have taken a more prophylactic approach known as the "majority test." Under this approach, the plaintiff need not show that the wrongdoers completely dominated the corporation,

but rather must show only that a majority of the board members were wrongdoers during period [*sic*] the plaintiff seeks to toll the statute. *Howse*, 736 F.Supp. at 1441-42; *Federal Sav. and Loan Ass'n v. Williams*, 599 F.Supp. 1184, 1193-94 (D.Md. 1984). These cases reason that the mere existence of a culpable majority on the board is so likely to preclude the corporation from filing suit against the wrongdoers that tolling is thereby justified. *See, e.g., Williams*, 599 F.Supp. at 1194. Perhaps an even stronger argument for the "majority test" is the possibility of concealment:

> As long as the majority of the board of directors are culpable they may continue to operate the association and control it in an effort to prevent action from being taken against them. While they retain control they can dominate the non-culpable directors and control the most likely sources of information and funding necessary to pursue the rights of the association. As a result it may be extremely difficult, if not impossible, for the corporation to discover and pursue its rights while the wrongdoers retain control.

Id. at 1193-94 n. 12.

We agree with the *Howse* court that Texas follows the "majority" version of the adverse domination doctrine. *Howse*, 736 F.Supp. at 1441. The controlling case is *Allen v. Wilkerson*, 396 S.W.2d 493 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.). As the *Allen* court plainly stated, "In order for limitations to run against a corporation's right of action against one of its own directors, two things must concur: (1) notice (2) to a disinterested majority of its board members." *Id.* at 500; *see also id.* at 501 ("[W]here . . . the corporation is de facto powerless to sue on such cause

of action because of the lack of a disinterested majority of its board, mere notice to shareholders does not start running of limitations against the corporate cause of action."). *Allen* thus demonstrated that Texas law is in accord with the "majority" version of the adverse domination rule. The FDIC's burden, therefore, was to raise a genuine issue of fact as to whether a majority of TIB's board was composed of wrongdoers through May 21, 1985, two years before the FDIC's appointment as receiver.

(2)

The issue most hotly contested by the parties is whether a plaintiff seeking to toll the statute of limitations under the adverse domination doctrine must sue all allegedly culpable directors. The FDIC argues that there is no requirement that all culpable directors must be sued in order for adverse domination to apply, although plainly the FDIC would still bear the burden of proving that a majority of the directors was culpable to obtain the benefit of the adverse domination doctrine. The appellees, on the other hand, argue that the cases indicate that all directors constituting the culpable majority must be sued.

Again, *Allen* provides this court with the necessary guidance. In *Allen*, the plaintiff was the creditor of a corporation, and he sued one member of the corporate debtor's four-person board for withdrawing funds from the corporation's account. *Id.* at 500-01. The case was tried to the court, and the defendant raised limitations as a defense. The trial judge granted judgment in favor of the plaintiff without making findings of fact, thereby implicitly holding that the statute had been tolled. *Id.* at 496, 500. The court of civil appeals affirmed, holding that the trial

judge could properly have tolled the statute because there was sufficient evidence that one of the three non-defendant directors was also not "disinterested." *Id.* at 501. *Allen* thus plainly demonstrates that a plaintiff may sue only a minority of the board and still assert adverse domination to toll the statute of limitations under Texas law.

The appellees urge that the *Allen* rule will work injustice to defendant directors because it will force them to defend the non-defendant directors when those directors have neither the standing nor the incentive to provide their own defense. The FDIC responds that it must be free to make independent litigation decisions regarding which directors it will sue and not sue. As the FDIC points out, there may be a host of reasons for it to choose to sue less than a majority of the board, such as a prior or pending discharge in bankruptcy, prior settlement of the claim or a prior restitution order, pendency of criminal proceedings against an individual or entity, judicial economy, and cost-effectiveness.

In response to the appellees' concerns, we note that the plaintiff still bears the burden of proving that a majority of the board consisted of wrongdoers for the relevant time period; the *Allen* rule does not shift onto the defendants the burden of proving that a majority of the board was *not* culpable. Nor is it necessarily true that the non-defendant directors have no incentive to fight the plaintiff's allegations that they were culpable. If shown to be culpable, the non-defendant directors could possibly be held liable to the defendant directors for contribution, or could later be joined as defendants themselves. In any event, our responsibility here is to apply Texas law as it exists, not to make policy decisions about what that law should be. The district court incorrectly as-

sumed that the adverse domination doctrine could not apply because the FDIC sued fewer than a majority of TIB's board of directors.

(3)

The final issue is whether Texas law would allow a plaintiff to establish the adverse domination doctrine by proving that a majority of a corporation's directors was merely negligent. We phrase the issue in this manner because our review of the summary judgment evidence shows that the FDIC raised an issue of fact with respect to whether TIB's board may have been negligent in supervising Desselle's lending activities. The FDIC filed with the district court the affidavit of an expert witness, William Watkins, who reviewed numerous TIB documents and OCC reports regarding TIB. According to the Watkins affidavit, the OCC cited TIB several times for serious deficiencies in its lending operations between January 1982 and May 1987. The TIB board "knew of and discussed at numerous board meetings the serious problems disclosed in the OCC examination reports between May 1982 and April 1987." In particular, Watkins opined that it was a "serious deficiency" for the TIB board to delegate oversight of the lending function to a loan committee composed entirely of internal bank employees up until August 1984. From these facts, we conclude that the FDIC raised a genuine issue of fact as to whether the non-defendant directors of TIB may have been negligent, but that it did not produce any evidence that the non-defendant directors were active participants in wrongdoing or fraud.

Texas case law provides little guidance to this court on this issue. Plainly in *Allen* the defendant director, who was sued for withdrawing funds from the corporation's accounts, acted with more than

mere negligence. *Allen*, 396 S.W.2d at 500-01. In *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex.1963), the other Texas case cited by the FDIC, the defendant directors were charged not only with breach of fiduciary duty and mismanagement, but also with conspiracy, misappropriation of corporate funds, and the usurpation of corporate opportunities. *Id.* at 570. No Texas case comes to light in which the adverse domination doctrine has been invoked based on the mere negligence of a majority of a corporation's directors.

We therefore turn to the law of other jurisdictions in order to predict how a Texas court would decide this issue. Before doing so, we remind ourselves that statutes of limitations are themselves expressions of important legislative policies and should not be judicially abrogated without due consideration of those policies. As the Texas Supreme Court has stated, statutes of limitations

> afford plaintiffs what the legislature deems a reasonable time to present their claims and protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. The purpose of a statute of limitations is to establish a point of repose and to terminate stale claims.

Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 828 (Tex. 1990) (citing *Safeway Stores, Inc. v. Certainteed Corp.*, 710 S.W.2d 544, 545-46 (Tex. 1986)). We consider also the longstanding Texas rule that the tort statute of limitations begins to run when the tort is committed, absent a statute to the contrary or

fraudulent concealment. *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967) (citing *Quinn v. Press*, 135 Tex. 60, 140 S.W.2d 438 (1940)).

The development of the adverse domination doctrine under state law in recent years has occurred almost exclusively in federal courts, with many district courts predicting in the absence of controlling state precedent that the states in which they sit would adopt the doctrine. *See, e.g., Resolution Trust Corp. v. Kerr*, 804 F.Supp. 1091, 1094, 1097 (W.D. Ark. 1992); *Resolution Trust Corp. v. Hecht*, 818 F. Supp. 894, 899 (D. Md. 1992); *FDIC v. Hudson*, 673 F. Supp. 1039, 1043 (D. Kan. 1987). Federal district courts have liberally applied the doctrine in favor of government-appointed receivers when they sue the directors of a failed bank, regardless of the nature of the claims. The court in *Hecht* applied the doctrine in a case in which the RTC alleged breach of fiduciary duty, negligence, gross negligence, and breach of contract, but did not allege any form of self-dealing or fraudulent conduct. *Hecht*, 818 F.Supp. at 896, 898. More notably, the district court for the district of Minnesota has applied adverse domination tolling to the FDIC's claims against the directors of a failed bank based on negligence alone. *FDIC v. Carlson*, 698 F.Supp. 178, 180 (D. Minn. 1988). Under the *Carlson* approach, adverse domination tolling could be available to the FDIC in the instant case.

We do not believe that Texas courts would extend the "very narrow doctrine," *Shrader & York*, 991 F.2d at 227, of adverse domination to cases in which the wrongdoing by a majority of the board amounts to mere negligence. To do so would effectively eliminate the statute of limitations in all cases involving a corporation's claims against its own directors. Taking our own case as a paradigm, it could almost always be

said that when one or two directors actively injure the corporation, or profit at the corporation's expense, the remaining directors are at least negligent for failing to exercise "every precaution or investigation." *Holloway*, 368 S.W.2d at 580. If adverse domination theory is not to overthrow the statute of limitations completely in the corporate context, it must be limited to those cases in which the culpable directors have been active participants in wrongdoing or fraud, rather than simply negligent.

California cases such as *Burt v. Irvine Co.*, 237 Cal. App. 2d 828, 46 Cal. Rptr. 392 (1965), support our conclusion. In that case the court described the adverse domination doctrine by saying that "it is generally held that an action *for fraud* committed against a corporation is tolled for the period that those responsible for the fraud remain in control of the corporation." *Id.* 47 Cal. Rptr. at 417 (emphasis added) (citations omitted). Further, "[t]he principle does not apply after discovery of the fraud by a protesting stockholder, and *cannot be applied to a cause of action predicated upon negligence.*" *Id.* (emphasis added) (citations omitted); *see also Whitten v. Dabney*, 171 Cal. 621, 154 P. 312, 315 (1915) ("So long as the corporation itself remains under disability and is powerless to act by virtue of the fact that its control is in the hands of a board of directors accused of participation in the frauds, the statute of limitations does not run against it.").

The facts of the instant case demonstrate that the adverse domination theory is inappropriate when the majority of the board is merely negligent. The FDIC's own evidence tended to show that most of TIB's directors may have been negligent in failing to supervise the lending functions. Yet, at the same time, the board never concealed its "serious deficien-

cies" from examination by the OCC or anyone else. Even after the OCC notified TIB's board of its shortcomings in supervising TIB's lending function, there is no evidence to suggest that an organized majority coalesced to prevent any other parties from discovering the problems. Thus, the danger of fraudulent concealment by a culpable majority of a corporation's board seems small indeed when the culpable directors' behavior consists only of negligence, and the presumption of such concealment that underlies the adverse domination theory is unwarranted.

We therefore hold that, under Texas law, a corporate plaintiff cannot toll the statute of limitations under the doctrine of adverse domination unless it shows that a majority of its directors was more than negligent for the desired tolling period.[4] Because the FDIC's summary judgment evidence, viewed in the light most favorable to the FDIC, showed only negligence on the part of the majority of TIB's board of directors, summary judgment in favor of the defendants was proper.

IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.

---

[4] We need not address the issue of precisely how culpable a majority of directors must be before adverse domination tolling is available, and we accordingly express no opinion on the subject beyond today's holding that mere negligence is not enough.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-90-1120

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver of TEXAS INVESTMENT BANK, N.A.,
PLAINTIFF

v.

ROCKLEIGH S. DAWSON, JR., KIRK K. WEAVER,
MICHAEL D. MALOY AND WAYNE DESSELLE,
DEFENDANTS

[Entered Dec. 10, 1991]

ORDER

Pending before the Court are:

A. plaintiff Federal Deposit Insurance Corporation ("FDIC") as Receiver of Texas Investment Bank, N.A. ("TIB") [*sic*] motion for leave to file second amended complaint (Document #57) and motion for partial summary judgment (Document #77);

B. defendant Michael D. Maloy's ("Maloy") motion to dismiss (Document #13);

C. defendant Kirk K. Weaver's ("Weaver") motion to dismiss and motion for summary judgment

(Document #29) and motion for judgment on the pleadings (Document #46); and

D. defendant Rockleigh S. Dawson, Jr.'s ("Dawson") motion for summary judgment (Document #38), motion to dismiss (Document #39), and motion for judgment on the pleadings (Document #44).

This Court has considered the motions, the submissions, argument of counsel in open court, and the applicable law, and rules as follows.

FDIC motion for leave to file second amended complaint:

FDIC currently seeks to hold all defendants liable for negligent conduct in connection with their responsibilities as officers and directors of the failed bank, TIB. FDIC asks this Court to permit an amendment to the complaint to allege both negligence and gross negligence. This Court determines that the motion should be denied.

FDIC motion for partial summary judgment:

The instant motion for partial summary judgment was filed on August 20, 1991. The submission date was thereafter set at September 9, 1991 pursuant to Local Rule 6(E). Defendant Wayne E. Desselle ("Desselle") has failed to respond. Thus, pursuant to Local Rule 6(E), the motion is deemed unopposed.

Further, through uncontroverted summary judgment evidence, FDIC has established that Desselle was negligent and grossly negligent is [*sic*] the exercise of his duties as an officer of TIB. *See Meyers v. Moody*, 693 F.2d 1196 (5th Cir. 1982), *cert. denied*, 464 U.S. 920 (1983). As such, FDIC is entitled to judgment against Desselle as a matter of law.

Maloy's motion to dismiss:

In his motion, Maloy asks this Court to dismiss FDIC's claim under Federal Rule of Civil Procedure 12(b)(6). Maloy asserts that FDIC's complaint fails to state a claim because during the periods of alleged wrongdoing by the board of directors, he was a nonvoting member. This Court determines that the motion should be denied.

Weaver and Dawson's motion to dismiss:

Weaver and Dawson ask this Court to dismiss FDIC's claims against them, in part, because the statute of limitations has expired as to all stated claims.

Statute of Limitations

I. Applicable Limitation Period

In its amended complaint, the FDIC alleges three causes of action: (1) negligence and breach of fiduciary duty against all defendants and (2) breach of contract against Dawson and Weaver. In Texas, tort claims are governed by a two-year statute of limitation. Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Vernon 1986). Negligence and breach of fiduciary duty both sound in tort and are, therefore, governed by the two-year statute of limitation. *See Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988).

In Texas, a contract claim is generally governed by a four-year statute of limitation. Tex. Civ. Prac. & Rem. Code Ann. § 16.004 (Vernon 1986). However, when a claim stated as a contract claim sounds in tort, it should be governed by the two-year tort statute of limitation. *See McNair v. Burt*, 68 F.2d 814, 815 (5th Cir. 1934). In the instant case, FDIC's claims for breach of contract are based upon the alleged failure of two defendants to fulfill their

obligations pursuant to the oath of office taken for board of director to a bank. The oath is as follows:

> "I, the undersigned, a director of the above-named bank [Texas Investment Bank, N.A.], being a citizen of the United States, do solemnly swear [affirm] that I will, so far as the duty devolves on me, diligently and honestly administer the affairs of said association; that I will not knowingly violate, or willingly permit to be violated, any of the provisions of the statutes of the United States under which this association has been organized . . . ."

The breach of an oath of this type sounds in tort. *McNair*, 68 F.2d at 815 (5th Cir. 1934). Although FDIC suggests that *McNair* is not authoritative because of contrary caselaw in the Ninth and Tenth Circuit Courts of Appeal, FDIC does not suggest that *McNair* has ever been overruled by the Fifth Circuit Court of Appeals or the United States Supreme Court. As such, in the Fifth Circuit, an action for breach of an director's oath of office sounds in tort and is governed by the two-year statute of limitation.

II. Accrual of Causes of Action

Causes of action which sound in tort generally accrue when the tort is committed. *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967). Causes of action which sound in contract generally accrue at the time of the breach. *Hurbrough v. Cain*, 571 S.W.2d 216, 221 (Tex. Civ. App. - Tyler 1978, no writ). A cause of action for breach of fiduciary duty accrues when the duty is breached. *Leigh v. Weiner*, 679 S.W. 2d 46, 49 (Tex.App. - Houston [14th Dist.] 1984, no writ).

In its amended complaint, the FDIC alleges wrongful conduct of all defendants in connection with

loans made or renewed through October 5, 1984. Thus, any claims which TIB had against any of the defendants accrued no later than October 5, 1984. Therefore, the statute of limitations on all claims expired on October 5, 1986.

III. Adverse Domination Tolling

The adverse domination rule provides a tolling of the statute of limitations in actions by a corporation against its directors when the allegedly culpable directors constitute a majority of the board of directors. *FDIC v. Howse*, 736 F. Supp. 1437, 1441 (S.D. Tex. 1990). In its amended complaint, FDIC asserts wrongful conduct on the part of two directors, Dawson and Weaver. At all times during the alleged wrongful conduct, the board of directors was comprised of nine voting members. Therefore, at no time during the alleged wrongful conduct did Dawson and Weaver constitute a majority of the board of directors. Therefore, the adverse domination theory does not apply to the facts pled in this case.

IV. Statute of Limitation Expires

As the causes of action for negligence accrued no later than October 5, 1984 and a two-year statute of limitations applies, the statute of limitations as to negligence/gross negligence expired no later than October 5, 1986. FDIC was appointed receiver for TIB on May 27, 1987. When the state statute of limitations has run prior to the onset of receivership, the FDIC cannot obtain the advantage of the longer federal limitations. *FDIC v. Howse*, 736 F. Supp. 1437, 1440 (S.D. Tex. 1990). Therefore, FDIC claims against both Weaver and Dawson are barred.

As this Court dismisses the FDIC claims as barred by the statute of limitations, the Court need not

address the remaining grounds for dismissal raised by Weaver and Dawson.

Based upon the foregoing, it is

ORDERED that:

A. plaintiff Federal Deposit Insurance Corporation's ("FDIC") motion for leave to file second amended complaint (Document #57) is DENIED and motion for partial summary judgment (Document #77) is GRANTED;

B. defendant Michael D. Maloy's ("Maloy") motion to dismiss (Document #13) is DENIED;

C. defendant Kirk K. Weaver's ("Weaver") motion to dismiss and motion for summary judgment (Document #29) is GRANTED, and motion for judgment on the pleadings (Document #46) is DENIED as MOOT; and

D. defendant Rockleigh S. Dawson, Jr.'s ("Dawson") motion for summary judgment (Document #38) is DENIED as MOOT, motion to dismiss (Document #39) is GRANTED, and motion for judgment on the pleadings (Document #44) is DENIED as MOOT.

All relief not specifically granted herein is DENIED.

SIGNED at Houston, Texas, on this the 3 day of Dec., 1991.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-90-1120

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver of TEXAS INVESTMENT BANK, N.A.,
PLAINTIFF

vs.

ROCKLEIGH S. DAWSON, JR., KIRK K. WEAVER,
MICHAEL D. MALOY AND WAYNE DESSELLE,
DEFENDANTS

[Entered May 4, 1992]

ORDER

Pending before the Court is the motion to dismiss and motion for summary judgment (Document #90) filed by defendant Michael D. Maloy ("Maloy"). Also pending is the motion for severance and entry of final judgment as to defendants Dawson and Weaver (Document #92) filed by defendants Rockleigh S. Dawson, Jr.'s [*sic*] ("Dawson") and defendant Kirk K. Weaver's [*sic*] ("Weaver"). Having considered the motions, the submissions, and the applicable law, the Court determines that the motion to dismiss and motion for summary judgment should be granted and

the motion for severance and entry of final judgment as to defendants Dawson and Weaver should be denied as moot.

Through its motion, Maloy asks this Court to dismiss FDIC's claims against him because the statute of limitations has expired as to all stated claims. This Court has previously determined that the FDIC's claims against Dawson and Weaver are barred by the statute of limitations. FDIC has asserted the same claims against Maloy that were asserted against Dawson and Weaver. Accordingly, this Court adopts its previous findings and conclusions (Document #88) herein and determines that the FDIC's claims against Maloy are barred by the statute of limitations. It is, therefore,

ORDERED that Maloy's motion to dismiss and motion for summary judgment (Document #90) is GRANTED. It is further ORDERED that Dawson and Weaver's motion for severance and entry of final judgment as to defendants Dawson and Weaver (Document #92) is DENIED as MOOT.

SIGNED at Houston, Texas, on this the 3 day of April, 1992.

/s/ David Hittner
DAVID HITTNER
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2460

FEDERAL DEPOSIT INSURANCE CORPORATION,
Receiver of TEXAS INVESTMENT BANK,
PLAINTIFF-APPELLANT

Versus

ROCKLEIGH S. DAWSON, JR., ET AL.,
DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS

[Filed Dec. 21, 1993]

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Before: REAVLEY, KING and GARWOOD, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active

service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
Carolyn Dineen King
United States Circuit Judge

REHG-6